Climate change litigation and administrative law — lessons for Australian practitioners?

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Social conflict, in any society that prides itself on the rule of law, will eventually be expressed in litigation. Most recently, conflict over the most appropriate way for society to manage the Covid-19 pandemic resulted in a plethora of litigation.[1] The resort to litigation is not surprising. People engaged in conflict wish to assert rights which, if vindicated by the law, will advantage them, maybe even bring them complete triumph, in the conflict. The more severe the conflict, the more likely that parties will resort to litigation. Or something worse even than litigation.

The music industry,[2] major sport,[3] the exploitation of new technology[4] and even pandemics[5] spawn social conflicts which, from time to time, express themselves through litigation. It is not at all surprising that a conflict over threats to the long-term health of the planet, which may be existential for human culture, would produce a significant amount of litigation.

The increase in climate change litigation also may be explained by the existence of this deepening social conflict. A 2020 United Nations Environmental Program report ('*2020 Status Review*')[6] explains that the current levels of both climate ambition and climate action of governments around the world are inadequate to meet the climate change challenge. As a result, individuals, communities, business entities, NGOs, sub-national governments and others have brought cases seeking to compel enforcement of existing laws to address climate change, to extend those laws, and to define the relationship between fundamental rights and the negative impacts of climate change.[7]

In 2017, the corresponding report identified 884 cases brought in 24 countries of which 654 cases were in the United States and 230 were in other countries. The *2020 Status Review* found that the number of cases had nearly doubled. As at 1 July 2020, there were 1,550 climate change cases filed in 38 countries (plus the courts of the European Union). Of these, 1,200 were filed in the United States and over 350 cases were filed in the rest of the world.[8] The increase in the numbers of countries experiencing such litigation from 24 to 38 is significant in itself.

The Australian cases which get a mention in the *2020 Status Review* include: *Ralph Lauren 57 v Byron Shire Council*;[9] *Waratah Coal Pty Ltd v Youth Verdict Ltd*;[10] *Pridel Investments Pty*

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1 See, eg, *Palmer v Western Australia* (2021) 272 CLR 505.
2 *Williams v Gaye*, 895 F 3d 1106 (9th Cir, 2018).
3 *News Ltd v Australian Rugby League Ltd (No 2)* (1996) 64 FCR 410.
4 *A & M Records Inc v Napster Inc*, 239 F 3d 1004 (2001).
5 *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219.
6 United Nations Environmental Program and Sabin Center for Climate Law, *Global Climate Litigation Report: 2020 Status Review*, 2020 ('*2020 Status Review*').
7 Ibid 4.
8 Ibid 4.
9 [2016] NSWSC 169; see *2020 Status Review* (n 6) 23.
10 [2020] QLC 33 (but now see *Waratah Coal Pty Ltd v Youth Verdict (No 6)* [2022] QLC 21); see *2020 Status Review* (n 6) 16.

Ltd v Coffs Harbour City Council;[11] *McVeigh v Retail Employees Superannuation Pty Ltd*;[12] *Abrahams v Commonwealth Bank of Australia*;[13] the petition of 14 Torres Strait Islanders to the Human Rights Committee alleging violations stemming from Australia's inaction on climate change ('*Daniel Billy v Australia*');[14] *Gray v Minister for Planning (NSW)*;[15] *Xstrata Coal Queensland Pty Ltd v Friends of the Earth*;[16] A*ustralian Conservation Foundation v Latrobe City Council*;[17] *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd*;[18] *Gloucester Resources Ltd v Minister for Planning (NSW)*;[19] and *Dual Gas Pty Ltd v Environmental Protection Authority (Vic)*.[20]

This list does not include the more recent decision in *Minister for the Environment v Sharma*[21] in which the Full Court of the Federal Court overturned a decision of Bromberg J[22] finding that the Minister in exercising her powers under the relevant Act on development applications had a duty to take reasonable care to avoid causing personal injury or death to Australian children arising from the emission of carbon dioxide into the Earth's atmosphere. Also handed down since the *2020 Status Review* was published is the decision of the Human Rights Committee in *Daniel Billy v Australia*[23] in which the Committee held that, through failure to take adequate measures to combat climate change and its effects, Australia was in breach of its obligations under articles 17 and 27 of the *International Covenant on Civil and Political Rights*[24] to protect, respectively, the petitioners' home, private life and family[25] and their rights to enjoy their minority culture as Torres Strait Islanders.[26]

Not every piece of climate change litigation necessarily falls within the realms of administrative law. A pure action for damages against a large oil company for property damage and financial loss suffered as a result of extreme weather events caused by climate change, based on the defendant company's contributions over time to rising carbon levels in the atmosphere, would fail to make the cut for what is usually understood to be administrative law.[27]

11 [2017] NSWLEC 1042; see *2020 Status Review* (n 6) 25.
12 Order of Perram J, Federal Court of Australia, NSD 1333/2018, order dated 14 March 2019; order dated 10 June 2020; see *2020 Status Review* (n 6) 27.
13 Federal Court of Australia, VID 879/2017 (case withdrawn); see *2020 Status Review* (n 6) 27.
14 Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (23 September 2022) ('*Daniel Billy v Australia*'); see *2020 Status Review* (n 6) 14.
15 (2006) 152 LGERA 258; see *2020 Status Review* (n 6) 41 n 35.
16 [2012] QLC 13; see *2020 Status Review* (n 6) 41 n 35.
17 (2004) 140 LGERA 100; see *2020 Status Review* (n 6) 41 n 36.
18 (1994) 86 LGERA 143; see *2020 Status Review* (n 6) 41 n 36.
19 [2019] NSWLEC 7; see *2020 Status Review* (n 6) 20.
20 [2012] VCAT 308; see *2020 Status Review* (n 6) 44.
21 (2022) 291 FCR 311 (FCAFC).
22 *Sharma v Minister for the Environment* [2021] FCA 560
23 *Daniel Billy v Australia* (n 14).
24 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
25 *Daniel Billy v Australia* (n 14) 14 [8.12].
26 Ibid 16 [8.14].
27 Peter Nygh and Peter Butt in their *Australian Legal Dictionary* (Butterworths, 1997) define 'administrative law' as the legal principles governing the relationship between the government and the governed. The exercise of power by administrators, including the state (the Crown), ministers, departmental officers, tribunals, boards, and commissions based on legal authority. The source of that legal authority may be statute or the common law, which includes prerogative. The Australian Institute of Administrative Law states that administrative law is principally the law of government actions, decisions, processes and accountability. It includes the basic constitutional arrangements for government, and the basic legal checks on government, in particular, by

A major part of the litigation considered in *2020 Status Review* is directed at government actions or inaction and, almost by definition, may be classified as drawing upon administrative law. Suits directed at government activity or inactivity need to identify rights in the plaintiff which are being threatened or abrogated by the government defendant. Depending on the constitutional arrangements in the particular jurisdiction, those rights may be found in the constitution; derived from common law; found in existing statutes and subordinate legislation; or found in international law and treaty obligations. Whatever the source of rights relied upon, one object of climate change litigation aimed at government defendants is to stimulate new thinking about established categories of rights. The litigation seeks to reconceive and redirect such rights and to apply them to the detrimental consequences of climate change.

The *2020 Status Review* categorises the cases identified in the survey as falling within five categories. One category involves cases alleging consumer and investor fraud through failure by companies to clearly disclose information about climate change and associated risks. A second category involves actions making claims arising out of extreme weather events alleging failure to plan for or manage such events in a proper way. Cases in the third category, which arise as existing cases are determined finally, raise questions of implementation of whatever relief has been granted. A fourth category involves cases addressing the law and science of attributing responsibility of private actors for contributing to the worldwide problem of climate change and cases arguing for greater action by governments to mitigate those contributions. The final category involves actions taken to international adjudicatory bodies notwithstanding that such bodies may lack an ability to enforce their findings.[28]

Any such taxonomy is likely to involve a degree of arbitrariness. The themes and structure of litigation, even addressing a particular area and source of social conflict, are likely both to vary in many ways and to display (often unexpected) similarities. Indeed, this is evident from the *2020 Status Review*'s more detailed consideration as cases pop up in more than one category.

A tangent: challenges for lawyers

The existential nature of the threat posed by climate change raises questions about the role of lawyers. The actions of green-washing fossil fuel producers raise the age-old question of lay friends and relatives — how could you act for a rapist or a murderer? — in more acute forms.

The Law Council of Australia's policy statement on climate change[29] considered the role of lawyers in the face of an existential threat, and observed that climate change litigation, globally and domestically, is raising novel causes of action across multiple areas such as environment and planning, administrative law, corporations law including directors' duties and, inter alia, human rights law, with varying degrees of success and with implications

parliaments, courts and tribunals, ombudsmen and other bodies. Administrative law is particularly relevant to the areas of migration, social security, taxation, industry regulation (for example, of health, education and media providers), environmental and development regulation, and professional regulation (for example, of doctors, lawyers and sportspeople), and concerns the inquiries and operations of local, state, territory and Commonwealth governments, and their privacy, freedom of information, fairness and human rights obligations: 'About AIAL', *Australian Institute of Administration Law* (Web Page) <https://aial.org.au/about/>.

28 *2020 Status Review* (n 6) 4.

29 Law Council of Australia, *Climate Change Policy* (Policy statement, 27 November 2021).

for Australian laws.[30] The policy statement suggested that Australian lawyers need to be alive to the unfolding legal implications of climate change and its consequences as these are adjudicated or settled over time.[31] It also warned that access to justice issues will be particularly relevant in the climate change context;[32] that climate change will create a need for climate-related legal knowledge and skills;[33] and that questions may arise about how lawyers should comply with their ethical obligations under professional conduct rules and common law principles in the context of climate change.[34]

It is, perhaps, a mild statement which leaves some fertile land to be explored in future years.

Context and purpose of climate change litigation

The lived experience of climate change is that people are being adversely affected already, or are facing being adversely affected in the future, by extreme weather events, rising ocean levels, loss of land, loss of usability of land, and many other impacts of a changing climate.[35]

An additional context and cause of climate change litigation is the almost universal inadequacy of governmental responses to mitigate the ongoing contributions of atmospheric gases that cause climate change, or to make the necessary societal and infrastructure changes to adapt to such climate change as cannot be avoided by mitigation.[36] That inadequacy of response is dumbfounding to many and, on one analysis, has persisted for over 44 years. It was on 23 June 1988, on a sweltering June day in Washington DC, that James Hansen, Columbia professor and NASA scientist, told a Senate Committee that he was 99 per cent sure that carbon pollution was already warming the earth, causing droughts and heatwaves. Lawmakers, said Hansen, must 'stop waffling' and deal with the problem.[37]

The objectives of climate change litigation and the sorts of remedies pursued comprehend the enforcement of such laws as have been enacted requiring mitigation and adaption actions by governments and others; the integration of climate action into the regulatory requirements of existing laws including environmental, energy and natural resources laws; the creation of new legal responses seeking to ensure mitigation and adaption activity; the recognition of harm suffered from, or threatened by, climate change as a breach of the protections and rights that currently exist or the creation and development of new protections and rights that provide compensation and other remedies for such harms; and the denunciatory satisfaction of making governments and private actors accountable for the actions and omissions that have caused or contributed to the adverse effects of climate on individuals and societies.[38]

30 Ibid 8 [34].
31 Ibid [35].
32 Ibid 8–9 [36]–[37].
33 Ibid [38].
34 Ibid 9 [39].
35 The *2020 Status Review* (n 6) lists the following: widespread warming; melting glaciers; vanishing snow cover; diminishing sea ice; rising sea levels; acidifying oceans; displacement of peoples; flooding; wildfires; and heat waves; and, paradoxically, freezing temperatures from winter storms: 9.
36 Ibid 4.
37 David J Craig, 'Hansen to Congress: Time is running out to save environment', *Columbia Magazine* (Summer 2008) <https://magazine.columbia.edu/article/hansen-congress-time-running-out-save-environment>.
38 *2020 Status Review* (n 6) 4.

Sources of rights

Both statute law (including constitutions) and judge-made law, of necessity, need to be adapted to changing circumstances, including changing social conditions. Anyone familiar with the workings of a written constitution knows, without thinking, that the words of variously old documents have to be made to work in quite different social circumstances to those in which the document was written and enacted into fundamental law.[39]

Judge-made law also has to adapt to the changing needs of society and the different forms of social conflict that come with changing times.[40]

Incremental development of the law is not enough in rapidly changing times and, for this reason, law reform bodies and parliaments are charged with developing often radically different laws to meet rapidly changing social circumstances.

Since the context of climate change litigation is the failure of parliaments and governments to do sufficient, the crafting of climate change litigation is, often, an attempt to speed up the process of adapting existing legal principles and the rights and remedies for which they provide to answer the unmet needs of those whose lives are being, or threatened with being, torn apart by climate change. Climate change litigation is directed to constructing new legal ideas from what has previously existed to deal with dramatically changed circumstances. At the same time, climate change litigation — even when, on a simple analysis, it is unsuccessful — is a clarion call to governments to stop their inaction and a statement to the public that governments can do more and that, we, the citizens, should demand more of our governments.

Three cases: three jurisdictions

This section discusses three cases from three quite different jurisdictions. Arguably, they are the three most famous climate change cases. As it turns out, each case sought to found its source of rights in the national constitution for that jurisdiction.

Each case displays an attempt to adapt existing concepts to do new work.

The cases had differing results. Ultimately, they display varying judicial responses to the challenge of serious threats to the continued existence of a viable planet and differing attitudes to the role of law and judges in circumstances where the other arms of government are unwilling or unable to respond to a burgeoning crisis.

Case 1: Urgenda Foundation v Netherlands

In *Urgenda Foundation v Netherlands* (‘*Urgenda*’),[41] the plaintiff, Urgenda (a running together of ‘urgent’ and ‘agenda’), had sought a court order directing the State of the Netherlands

39 *Singh v Commonwealth* (2004) 222 CLR 322, 334–5 [16]–[18] (Gleeson CJ).

40 *Dietrich v The Queen* (1992) 104 ALR 385, 402–3 (Brennan J).

41 Supreme Court of the Netherlands, 19/00135 (20 December 2019) (‘*Urgenda*’). Citations are to the English translation of the judgment available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>.

to reduce the emissions of greenhouse gases originating from Dutch soil by at least 25% compared to 1990 levels. In 2015, the District Court allowed Urgenda's claim by ordering the State to reduce its emissions by at least 25 per cent compared to 1990. In 2018, the Court of Appeal confirmed the District Court's decision. A further appeal by cassation[42] went to the Supreme Court of the Netherlands and judgment was handed down on 20 December 2019.[43]

The Court of Appeal had held that there was a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. The Court of Appeal also held that it was 'clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced'.[44] The Netherlands Government did not dispute these factual findings.[45]

The *Constitution of the Kingdom of the Netherlands 2008* ('*Dutch Constitution*')[46] automatically incorporates treaty obligations undertaken by the Dutch government into domestic law. This is achieved by article 94 of the *Dutch Constitution* which provides that the courts must disapply legislation if required by the binding provisions of treaties to which the nation is a party.[47] Further, because the Netherlands is bound by the *European Convention on Human Rights* ('*ECHR*'),[48] the Dutch courts are obliged, under articles 93 and 94 of the *Dutch Constitution*[49] to apply the *ECHR*'s provisions as interpreted by the European Court of Human Rights ('ECtHR').[50]

The Supreme Court's decision dismissing the government's appeal relied on the protections contained in articles 2 and 8 of the *ECHR*.

Article 1 provides that the contracting parties to the *ECHR* must secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the *ECHR*.[51] The Court held that *ECHR* protection is owed by the State to the residents of the Netherlands.[52]

42 A court of cassation does not re-examine the facts in a case but hears appeal only by reference to possible errors in application of the law. See 'Court of cassation', *Wikipedia* (30 July 2023) <https://en.wikipedia.org/wiki/Court_of_cassation>.

43 *Urgenda* (n 41) 2.

44 Ibid 19 [4.7].

45 Ibid [4.8].

46 *Constitution of the Kingdom of the Netherlands 2008* ('*Dutch Constitution*'); an English translation is available at <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

47 Ibid 35 [8.2.4].

48 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953) ('*European Convention on Human Rights*' or '*ECHR*').

49 *Dutch Constitution* (n 46) art 93 provides that provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they are published; and art 94 provides that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions of international institutions that are binding on all persons.

50 *Urgenda* (n 41) 40 [8.3.3].

51 Section 1 of the *ECHR* (n 48) is headed 'Rights and Freedoms' and contains arts 2–18.

52 *Urgenda* (n 41)19 [5.2.1].

Article 2 of the *ECHR* protects the right to life.[53] The Supreme Court held that, according to established case law of the ECtHR, article 2 also encompasses a state's obligation to take positive steps to safeguard the lives of those within its jurisdiction. The Court observed, citing applications of the article in circumstances of hazardous industrial activities and natural disaster, that states are obliged to take appropriate steps if there is a real and an immediate threat to persons and the state is aware of the risk. The Court eschewed any view that imminence meant that the risk must materialise in a short period of time. Rather, the requirement for the obligation to arise is that the risk in question is directly threatening the persons in question.[54]

Article 8 of the *ECHR* protects the right to respect for private and family life.[55] The Court observed that article 8 also has effect in respect of environmental issues. ECtHR case law establishes that article 8 will apply where the materialisation of environmental hazards may have direct consequences for a person's private life even if a person's health is not in jeopardy. Article 8 encompasses a positive obligation to take appropriate measures to protect individuals against serious damage to their environment. The obligation exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.[56]

The Supreme Court also observed that the obligation exists even if the materialisation of the danger is uncertain pursuant to the precautionary principle, which is also recognised in the case law on the *ECHR*.[57]

Under the *ECHR*, there is an onus on the State to produce evidence that its policy responses to a danger are appropriate in all the circumstances.[58]

The Court referred to article 13 of the *ECHR* as relevant to applying articles 2 and 8. Article 13 provides a right to an effective remedy in the case of breaches of rights under the *ECHR*. The Court observed that, pursuant to article 13, a national court must offer effective legal protection from violations of the rights and freedoms ensuing from the *ECHR*.[59]

The Supreme Court found itself facing a question arising from the worldwide nature of climate change and the causes of climate change. What was the obligation of the Netherlands in circumstances where other countries and their industrial complexes were continuing to emit greenhouse gases that would threaten the lives and the private and family life of the residents of the Netherlands? The answer was that the Netherlands Government had to do its part.[60] In coming to its conclusion on this point, the Court drew upon the content of the *United Nations*

53 'Everyone's right to life will be protected by law …': *ECHR* (n 48) art 2(1).
54 *Urgenda* (n 41) 19–20 [5.2.2].
55 'Everyone has the right to respect for his private and family life, his home and his correspondence.': *ECHR* (n 48) art 8(1).
56 *Urgenda* (n 41) 20 [5.2.3].
57 Ibid 20 [5.3.2].
58 Ibid 21 [5.3.2].
59 Ibid 22 [5.5.1]–[5.5.3].
60 Ibid 23 [5.6.3]–[5.7.1]. The basis for this conclusion is developed at some length, drawing on a number of different principles from international law at [5.7.2]–[5.8].

Framework Convention on Climate Change ('*UNFCCC*');[61] recommendations in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change; and resolutions of various Conferences of the Parties under the *UNFCCC* to find a high degree of consensus that developed countries (annex I countries) needed to reduce their emissions by 25–40 per cent from 1990 levels by 2020.[62]

As a result, the Supreme Court ruled that, for the Dutch government to be taking appropriate measures in accord with its article 2 and 8 obligations, adhering to a target of reducing the Netherlands emissions by 25 per cent by 2020 was an absolute minimum.[63] The order of the District Court remained in place.

In *Urgenda*, the cause of action was based on the obligations of a human rights treaty to which the Netherlands had been a party since 3 September 1953. For that reason, *Urgenda* is instructive as to the benefits of seeing the impacts of climate change through the prism of the rights protected by human rights instruments. Unlike the situation in Australia, the *Dutch Constitution* has provision which make the binding provisions of treaties to which the country is a party enforceable through the Dutch legal system. In Australia, treaty provisions do not become part of Australian domestic law unless and until the Parliament enacts them through legislation. The passing of Human Rights Acts in states and territories in Australia does give legal force to specified human rights found in a number of international human rights treaties subject to Parliament's power to legislate otherwise. This creates a potential to draw on arguments of the kind relied upon in *Urgenda*.[64]

Early in 2022, one of the lawyers who acted for Urgenda, Dennis van Berkel, was asked about the influence of the *Urgenda* case and the final decision of the Supreme Court. Van Berkel said that, during the litigation, the Netherlands Government appeared to believe that the case would be unsuccessful and the District Court decision would be overturned at some stage. So, it was not until the Supreme Court confirmed the rulings of the lower courts that the Government seemed to treat the matter with urgency. In early 2020, the Government announced cutbacks in coal generation, and a caretaker government, in power from March 2021, introduced a further package of measures. Urgenda, however, felt that the responses were insufficient and was considering further legal action.[65]

An incoming coalition government that took office on 10 January 2022 has changed the approach to climate change mitigation and has reserved 35 billion euros for climate-related measures.[66]

61 *United Nations Framework Convention on Climate Change*, opened for signature 3 June 1992 (entered into force 21 March 1994).
62 *Urgenda* (n 41) 27–30 [7.1]–[7.2.11].
63 Ibid 33 [7.5.1].
64 See, eg, *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33.
65 Isabella Kaminski, '*Urgenda* two years on: what impact has the landmark climate lawsuit had?', *CarbonCopy* (8 June 2022) <https://carboncopy.info/urgenda-two-years-on-what-impact-has-the-landmark-climate-lawsuit-had/>.
66 Ibid.

Case 2: Leghari v Pakistan

In *Leghari v Pakistan* ('*Leghari*'),[67] on 4 September 2015, Judge Syed Mansoor Ali Shah of the Lahore High Court handed down an eight-page judgment in which he issued orders directed to a number of government ministries, departments and authorities of the Federation of Pakistan and the State of Punjab requiring them to take a number of very specific steps to implement an existing *Framework for Implementation of Climate Change Policy* ('*Framework*'), including the establishment of a Climate Change Commission to start to achieve tangible progress on the ground in achieving mitigation of, and adaptation measures against, climate change.[68]

Ashgar Leghari, the petitioner, was an agriculturist and a citizen of Pakistan who approached the Court through a public interest litigation process to challenge the inaction, delay and lack of seriousness of the Pakistan Government and the Government of Punjab in addressing the challenges and to meet the vulnerabilities associated with climate change.[69]

Mr Leghari argued that climate change is a serious threat to the water, food and energy security of Pakistan, which offends the fundamental right to life under article 9[70] of the *Constitution of the Islamic Republic of Pakistan 1973* ('*Pakistan Constitution*').[71] The *Pakistan Constitution* also has a chapter (pt 2 ch 1 arts 8–28) dedicated to the protection of fundamental rights.

The Court held that climate change is a defining challenge of our time and has led to dramatic changes in our planet's climate system.[72] The effects of climate change, including heavy floods and droughts, constitute, on a legal and constitutional plane, a clarion call for the protection of fundamental rights of citizens, especially the vulnerable and weak segments of society who are unable to approach the court.[73]

The Court also held that fundamental rights, like the right to life, which includes the right to a clean and healthy environment, and right to human dignity (art 14)[74] read with the constitutional principles[75] of democracy, equality, social, economic and political justice, include within their ambit the international environmental principles of sustainable development, the

67 *Leghari v Pakistan* (Lahore High Court, Case no 25501/2015 (25 January 2018)) ('*Leghari*'). This final judgment (delivered after a sustained period of supervision by the Court of actions taken by government agencies and office holders) reproduced the orders, reasoning and findings by the Court on earlier occasions, and is available at <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180125_2015-W.P.-No.-25501201_judgment.pdf>.

68 Order of Shah J in *Leghari v Pakistan* (Lahore High Court, Case no 25501/2015 (4 September 2015)), cited in *Leghari* (n 67) 11 [13].

69 *Leghari* (n 67) 2 [1].

70 *Constitution of the Islamic Republic of Pakistan 1973* ('*Pakistan Constitution*') art 9: 'No person shall be deprived of life or liberty except in accordance with law.'

71 *Leghari* (n 67) 2.

72 Ibid 10 [11].

73 Ibid.

74 *Pakistan Constitution* (n 70) art 14(1): 'The dignity of man and, subject to law, the privacy of home, shall be inviolable.'

75 Ibid ch 2 arts 29–40 provide for 'Principles of Policy' which each organ of government is required to advance. However, these are not the constitutional principles referred to by the Supreme Court, which appear more fundamental.

precautionary principle, environmental impact assessment, inter-generational equity and the public trust doctrine.[76]

The Court also held that there was a need to move from environmental justice to climate change justice. It held that the fundamental rights of right to life, right to human dignity, right to property[77] and right to information,[78] read with the constitutional values of political, economic and social justice, provide the judicial toolkit to address and monitor the Government's response to climate change. And, so, the Court went on to make its orders against the collected government departments to do things.

Ten days, later, on 14 September 2015, Judge Shah had the parties, including a long list of representatives of government departments and agencies, back before him and issued a fresh set of reasons and made orders.[79] Judge Shah stated that he had heard from the representatives of the ministries and the respective provincial departments and it was quite clear to him that no material exercise had been done on the ground to implement the *Framework*.[80]

Then, Judge Shah proceeded to appoint the Climate Change Commission, composed of a chairperson and a series of influential public servants.[81] The Commission's objectives or terms of reference were the effective implementation of the National Climate Change Policy ('NCC Policy') and the *Framework*.[82] Powers were bestowed upon the Commission, including the power 'to co-opt any person/expert, at any stage' and the power to seek the assistance of any federal or provincial departments and ministries.[83] The creation of the Commission and the bestowing of powers was done pursuant to Order 26 of the Pakistan *Code of Civil Procedure 1908*, which makes provision for the appointment of commissions, principally to examine witnesses or to conduct local examinations and to report.

It appears that what Judge Shah did was to create a commission of inquiry which would continually report to him in order to shame the government and the public service of each of Pakistan and Punjab Province into implementing the climate change policy documents which, he found, were essentially being ignored.

By 25 January 2018, two years and five months after Judge Shah's initial ruling, the case had seen 27 hearings, including the two already discussed on 4 and 14 September 2015, and Judge Shah had become Chief Justice of the Lahore High Court.

76 *Leghari* (n 67) 10 [12].
77 *Pakistan Constitution* (n 70) art 23: 'Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest.'
78 Ibid art 19A: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.
79 *Leghari* ((n 67) 11–13 [13].
80 Ibid 11 [13].
81 Ibid 11–13 [13].
82 Ibid 12 [13].
83 Ibid.

Chief Justice Shah attached to his reasons delivered on 25 January 2018[84] an epigraph from Achim Steiner, the Executive Director of the United Nations Environment Program, which stated: 'Climate change is one of the greatest threats to human rights of our generation, posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across the world'.[85]

The Chief Justice described the Court's handling of the matter before it as a 'rolling review' or a 'continuing mandamus' and also considered it a writ of *kalikasan*.[86] He also described the Court as proceeding 'in an inquisitorial manner by summoning … for assistance' a large number of federal and provincial government agencies.[87]

The Chief Justice observed that the NCC Policy and the *Framework* focused on adaptation to climate measures[88] but observed that, although Pakistan's contribution to global greenhouse gas emissions was very small, both documents gave 'due importance to mitigation efforts' in various sectors, highlighting Pakistan's 'role as a responsible member of the global community'.[89]

The Chief Justice recalled the forming of the Commission by its order dated 14 September 2015.[90] The Chief Justice referred to the Commission's supplemental report dated 24 February 2017 and its recommendations to government to develop and implement plans for climate change adaptation, especially to develop a National Water Policy.[91]

The Chief Justice also drew upon a report of the Commission dated 24 January 2018. This report indicated that progress had been made on 144, or about 60%, of the priority actions in the *Framework*, but that progress was 'uneven', and much remained to be done, including allocating further resources.[92]

The Chairman of the Commission had told the Court that, in his opinion, the Commission had achieved its goals; the Pakistan *Climate Change Act 2017* had been promulgated; the Pakistan Climate Change Authority had been created by the Act; and that, in order to move forward, the Court should direct the government to give effect to the Act and implement the *Framework*. The Chief Justice agreed with these observations.[93]

The Chief Justice went on to note that commissions constituted by the courts had played multiple roles in Pakistan, especially in addressing environmental concerns.[94]

84 *Leghari* (n 67) 2.
85 Ibid 2.
86 Ibid 3 [4]. A writ of *kalikasan* is a term used in the Philippines to mean 'a legal remedy designed for the protection of one's constitutional right to a healthy environment': ibid n 2.
87 Ibid 3 [4]
88 The challenges of finding and implementing adequate adaptation measures were highlighted by the 2022 floods in Pakistan which killed over a thousand people and inundated a third of the country: Paola Rosa-Aquino, 'Deadly floods in Pakistan highlight a troubling problem', *Yahoo! Insider* (1 September 2022) <https://www.yahoo.com/video/deadly-floods-pakistan-highlight-troubling-180433377.html>.
89 *Leghari* (n 67) 7 [7].
90 Ibid 11 [13].
91 Ibid 14 [16].
92 Ibid 16 [18].
93 Ibid 21 [19].
94 Ibid.

Chief Justice Shah referred to earlier cases and observed that Pakistan's environmental jurisprudence has woven Pakistan's constitutional values and fundamental rights with international environmental principles.[95] The Chief Justice compared the differing approaches of adaptation and mitigation, and stated that, while mitigation can still be achieved with environmental justice, adaptation can only be achieved with climate justice where the courts help build adaptive capacity and climate resilience by engaging with multiple stakeholders.[96]

The Court formally dissolved the Commission[97] but went on to create a Standing Committee on Climate Change to act as a link between the judiciary and the executive, and to render assistance to government agencies to make sure that the work of implementing the *Climate Change Act* proceeded.[98]

The Chief Justice ordered that, although the proceedings stood concluded, he did not dispose of the petition but consigned it to the record so that the Standing Committee could approach the Court for appropriate orders to enforce the fundamental rights of the people in the context of climate change, if and when required.[99]

A 2019 article in the *King's Law Journal*[100] argues that Shah CJ's directive judicial approach is likely to raise the hackles of many British-educated lawyers as seeing the judge 'wading deep into policy decisions'.[101] The authors, Barritt and Sediti, argue that this is a mischaracterisation of the case and that what the Court did was to act in a supervisory capacity to ensure that a previously ignored, enacted law is applied and fundamental rights are observed. This is simply playing the balancing role that we expect courts to play in constitutional arrangements, particularly, where there is constitutional protection of fundamental rights.[102]

Barritt and Sediti also argue that *Leghari* was being drawn upon by people framing climate change litigation in the Philippines and India. They conclude by saying that

> *Leghari* is undoubtedly a lodestar in the growing tide of climate change lawsuits across the globe. … [I]t sets the standard for the kind of judgment climate litigation activist[s] are hoping for. It is also a sadly rare example of a case from the Global South attracting scholarly attention in the Global North.[103]

Syed Mansour Ali Shah was appointed a Justice of the Supreme Court of Pakistan on 7 February 2018. Based on seniority in the composition of the Court, he will become Chief Justice of Pakistan on 5 August 2025.[104]

95 Ibid 22 [20].
96 Ibid 23 [22].
97 Ibid 25 [24].
98 Ibid 25 [25].
99 Ibid 26 [27].
100 Emily Barritt and Boitumelo Sediti, 'The symbolic value of *Leghari v Federation of Pakistan*: climate change adjudication in the Global South' (2019) 20(2) *King's Law Journal* 203.
101 Ibid 205.
102 Ibid.
103 Ibid 210.
104 Supreme Court of Pakistan, 'Mr Justice Syed Mansoor Ali Shah', *Honorable Judge Details* (Web Page) <https://www.supremecourt.gov.pk/judges/honorable-judge-details/?judgeName=Mr.%20Justice%20Syed%20Mansoor%20Ali%20Shah>.

Case 3: Juliana v United States

In *Juliana v United States* ('*Juliana*')[105] the US Court of Appeals for the Ninth Circuit, in a judgment filed on 17 January 2020, upheld an appeal by the United States and various officers of the US Government from the judgment of Judge Ann Aiken presiding as the US District Court for the State of Oregon. By allowing the appeal by a 2–1 majority, the Ninth Circuit granted summary judgment dismissing the action by the plaintiffs. A petition by the plaintiffs

that the appeal be reheard by all the judges of the Ninth Circuit was denied by an order filed on 10 February 2021.[106]

The majority in *Juliana* consisted of Murguia and Hurwitz JJ. Judge Hurwitz wrote the judgment on behalf of the majority. Judge Staton delivered a dissenting judgment.[107]

The plaintiffs were 21 young citizens of the United States, an environmental organisation, and a self-styled 'representative of future generations'.[108] A glance through the list of plaintiffs[109] reveals that the representative of future generations was not just any such representative but the same Professor James Hansen who, 44 years ago, had told the world that he was 99 per cent sure that climate change was already happening and that the waffling should stop.[110]

The named defendants were the President, the United States and a number of federal agencies, referred to in the judgment, and here, collectively as 'the government'.[111]

The conduct complained of was continuing to permit, authorise and subsidise fossil fuel use despite long being aware of its risks, thereby causing climate change–related injuries to the plaintiffs. These included psychological harm, damage to recreational interests, exacerbated medical conditions, and damage to property.[112] The said harms were asserted to be breaches of the plaintiffs' substantive rights[113] under the Due Process clause of the Fifth Amendment;[114] the plaintiffs' rights under the Fifth Amendment to equal protection of the law; the plaintiffs' rights under the Ninth Amendment;[115] and the public trust doctrine.[116]

The remedies sought were declaratory relief and an injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]'.[117]

105 947 F 3d 1159 (9th Cir, 2020) ('*Juliana*').
106 Order of the Full Court in *Juliana* (n 105) (10 February 2021).
107 *Juliana* (n 105) 3.
108 Ibid 11 (Hurwitz J).
109 Ibid 2.
110 Craig (n 37).
111 *Juliana* (n 105) 11–12 (Hurwitz J).
112 Ibid 12.
113 Ibid.
114 'No person … shall be deprived of life, liberty or property without due process of law …'.
115 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'
116 See 'The doctrine of public trust', *Lawyers & Jurists* (Web Page) <https://www.lawyersnjurists.com/article/doctrine-of-public-trust/>.
117 *Juliana* (n 105) 12 (Hurwitz J).

The procedural history of *Juliana* is complex.

Judge Aiken, in the District Court, had originally dismissed a motion for dismissal.[118] Her Honour concluded that the plaintiffs had standing to sue; had raised justiciable questions; and had stated a claim for infringement of a Fifth Amendment due process right to a climate system capable of sustaining life. Judge Aiken also held that the plaintiffs had stated a viable 'danger creation' due process claim arising from the government's failure to regulate third-party emissions. The third basis of finding justiciability was that the plaintiffs had stated a public trust claim grounded in the Fifth and Ninth Amendments.[119]

The government sought a writ of mandamus from the Ninth Circuit seeking an order that the District Court dismiss, primarily on the basis that being forced to discovery was onerous on the government; the application was dismissed by a court composed of Thomas CJ, Berzon and Friedland JJ on 3 July 2018.[120] The government then brought an application for a stay of proceedings to the Supreme Court.[121] The application was denied on 30 July 2018 but the Court observed that the breadth of the plaintiffs' claims was striking.[122]

The defendants, after delivering their defence, then brought an application for summary judgment and judgment on the pleadings in the District Court, which was again heard by Aiken J. On 15 October 2018, Aiken J granted summary judgment on the plaintiffs' Ninth Amendment claim, removed the President as a defendant, and dismissed the equal protection claim in part. But her Honour otherwise dismissed the applications for summary judgment and judgment on the pleadings, finding that the plaintiffs had standing to sue, and that sufficient evidence had been presented to survive summary judgment, and rejecting an argument that the plaintiffs could only pursue their claims pursuant to the *Administrative Procedure Act* ('*APA*').[123]

It was from this judgment that the appeal was heard in the Ninth Circuit.

The Court of Appeals rejected the government's argument that the *APA* precluded the plaintiffs from bringing their claims otherwise than under the Act.[124] The Court observed that the plaintiffs' claims did not involve a claim that any individual agency exceeded its statutory authorisation or that any action, taken alone, was arbitrary or capricious. Rather, the plaintiffs argued that the totality of various government actions contributed to deprivation of the plaintiffs' constitutionally protected rights. Because the *APA* only allows challenges to discrete agency decisions, the plaintiffs could not effectively pursue their constitutional claims under the statute.[125] The Court observed that, because denying any judicial forum for a colourable constitutional claim presents a serious constitutional question, it was necessary for the statute to evince a clear intent to deny such forum and the *APA* displayed no such intent.[126]

118 *Juliana v United States*, 217 F Supp 1224 (2016).
119 *Juliana* (n 105) 12–13 (Hurwitz J).
120 Ibid 13; *In re United States*, 884 F 3d 830, 837–38 (9th Cir, 2018).
121 The defendants also brought a second mandamus application to the Ninth Circuit which was also dismissed.
122 *Juliana* (n 105) 13 (Hurwitz J); *United States v US District Court for District of Oregon*, 139 S Ct 1 (2018).
123 *Juliana* (n 105) 13; *Juliana v United States*, 339 F Supp 1062 (D Or, 2018).
124 5 USC §§ 551–559.
125 *Juliana* (n 105) 16 (Hurwitz J).
126 Ibid 17.

The Court considered the defendants' argument that the plaintiffs did not have article III standing to pursue their constitutional claims. It observed that, to have standing under article III of the *United States Constitution*, 'a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision'.[127] The plaintiffs succeeded on the issues of concrete injury and causation but failed on the issue of redressability.

The Court observed that at least some plaintiffs claimed concrete and particularised injuries. By way of example, one plaintiff claimed that she was forced to leave her home because of water scarcity leading to separation from her family on the Navajo Reservation. Another plaintiff had to evacuate his home multiple times because of flooding. These injuries were not regarded by the Court as merely conjectural or hypothetical. It was important that climate change was affecting at least some of the plaintiffs now rather than at some time in the future.[128]

The government's argument that climate change was affecting everybody was held not to go to this aspect of standing. The Court held that it did not matter how many people were affected provided the harm is concrete and personal. In concluding that the District Court was correct to find the presence of a concrete and particularised injury, the Court also observed that standing is satisfied if one of a number of plaintiffs has standing. That is, at least one plaintiff must have standing for all of the relief sought.[129]

On the causation element of standing, the Court of Appeals held that causation can be established even if there are multiple links in the chain as long as the chain is not hypothetical or tenuous. In finding that the causal chain was sufficiently established, the Court observed that the plaintiffs' alleged injuries were caused by carbon emissions from fossil fuel production, extraction and transportation. The United States accounted for over 25 per cent of worldwide emissions from 1850 to 2012 and, at the time of the suit, accounted for 15 per cent. The Court also observed that the plaintiffs' evidence showed that federal subsidies and leases have increased those emissions.[130]

In rejecting the government's argument that the causal chain was too attenuated because it depends, in part, on the independent actions of third parties, the Court drew the distinction between a failure to regulate five oil refineries where the refineries had a 'scientifically indiscernible impact' on climate change,[131] and the host of federal policies, from subsidies to drilling permits, spanning over 50 years and direct actions by the government relied on by the plaintiffs. The Court held that there was at least a genuine dispute as to whether those policies were a substantial factor in causing the plaintiffs' injuries.[132]

Turning to the third element of standing, redressability by an Article III court, the Court of Appeals pointed out that the plaintiffs' claim was that the government's actions had deprived the plaintiffs of a substantive constitutional right to a climate system capable of sustaining human life, as opposed to a claim that a particular act or regulation had been breached or a

127 Ibid 18.
128 Ibid 18–19.
129 Ibid 19.
130 Ibid 19–20.
131 *Washington Environmental Council v Bellon*, 732 F 3d 1131, 1141–6 (9th Cir, 2013).
132 *Juliana* (n 105) 20 (Hurwitz J).

claim that a procedural right had been denied. The relief claimed was a remedial declaration and injunctive relief.[133]

For the question of redressability, the Court was prepared to assume that the substantive constitutional right to a climate system capable of sustaining human life existed.[134]

The Court held that, to establish redressability, the plaintiffs must show two things, namely, 'that the relief they seek is (1) substantially likely to redress their injuries; and (2) within the district court's power to award'. The Court observed that redress 'need not be guaranteed' but 'must be more than "merely speculative" '.[135]

The Court held that the declaration sought, that the government was violating the *United States Constitution*, was 'not substantially likely to mitigate the plaintiffs' asserted concrete injuries' because a declaration, although psychologically beneficial, 'is unlikely by itself to remediate [the plaintiffs'] alleged injuries absent further court action'.[136]

In considering the injunction sought for redressability purposes, the Court stated that the plaintiffs sought to enjoin the executive from exercising discretionary authority expressly granted by Congress and, indeed, to enjoin Congress from exercising power expressly granted by the *United States Constitution* over public lands,[137] namely, that 'Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States'.[138]

The Court then drew a distinction between what appears to be a concession in oral argument that the plaintiffs sought only to challenge affirmative actions by the government (such as the grant of a lease or a drilling permit) and the plaintiffs' expert evidence which showed that just stopping the promotion of fossil fuels was insufficient and no less than a fundamental transformation of the world's energy systems was needed.[139] The Court rejected the argument that the requested relief would likely slow or reduce emissions so as to ameliorate the plaintiffs' injuries to some extent. This position was reached by distinguishing a precedent, *Massachusetts v Environmental Protection Agency*,[140] that had indicated that an improvement on the status quo would be enough to satisfy redressability.[141] The Court expressed scepticism that the first prong of redressability (that the relief sought was substantially likely to redress the plaintiffs' injuries) would be satisfied, but it did not rest its decision on that prong.[142]

Rather, the Court based its whole decision on the plaintiffs' inability to satisfy the second prong of redressability, namely, that the relief sought was within an Article III court's power to grant. The Court accepted that it would be a good thing if an effective plan was developed and implemented to avert the dangers caused by climate change, but concluded that such a plan

133 Ibid 21.
134 Ibid.
135 Ibid.
136 Ibid 22.
137 Ibid.
138 *United States Constitution* art IV § 3 cl 2.
139 *Juliana* (n 105) 23 (Hurwitz J).
140 549 US 497, 517 (2007).
141 *Juliana* (n 105) 24 (Hurwitz J).
142 Ibid 25.

would be too complex and would require legislative actions by Congress and a plethora of discretionary decision-making that would be impossible for a court to supervise or enforce.[143]

The Court relied, in coming to this conclusion, on a US Supreme Court authority in a partisan gerrymandering case, *Rucho v Common Cause* ('*Rucho*'),[144] in which it was held that gerrymandering claims presented political questions beyond the reach of Article III courts. The court in *Rucho* did not deny that extreme partisan gerrymandering can violate the *United States Constitution* but concluded that there was no limited and precise standard discernible in the *Constitution* for redressing the asserted violation.[145] The Court of Appeals in *Juliana* said that *Rucho* reaffirmed that redressability questions implicate the separation of powers, and that, because 'it is axiomatic that "the Constitution contemplates that democracy is the appropriate process for change" …, some questions — even those existential in nature — are the province of the political branches'.[146] The Court in *Juliana* said that the court in *Rucho* found that a proposed mathematical standard was 'too difficult for the judiciary to manage' and that it was impossible, in the case before it, to reach a different conclusion.[147]

And so the plaintiffs lost. The appeal was upheld. And the action was struck out.[148]

One might have thought that that was the end of *Juliana*. The case continues to attract amicus briefs including from members of Congress and state attorneys-general. On 9 March 2021, the plaintiffs filed a motion back in the District Court to amend their petition to claim an adjusted remedy that would accord with the ruling of the Ninth District. Four days later, Aiken J ordered a settlement conference between the lawyers for the parties. That settlement conference came to an end without agreement on 1 November 2021. In the meantime, the motion to amend was argued on 25 June 2021. The parties are still awaiting a ruling from Aiken J.[149]

In an article published on 10 March 2021, the *Harvard Law Review* reviewed the decision of the Ninth Circuit in *Juliana*.[150] The article suggests that the decision 'subtly but significantly narrows the remedial capacity of courts adjudicating large-scale "structural reform" cases'.[151] These are cases where 'courts require schools, firms, and other social institutions to change their behavior in order to make amends for past lawbreaking, most notably racial discrimination'.[152] The article indicates that '*Juliana*'s focus on "limited and precise" legal standards could conceivably disrupt longstanding judicial practice in large-scale structural reform cases' where litigation is 'often long on judicial "flexibility" and short on specific doctrinal rules'.[153] The article also criticised *Juliana*'s reliance on *Rucho*, saying that *Rucho* was concerned with rules governing primary conduct and not about limits to remedies which can be granted by an Article III court: 'By collapsing this distinction between flexible

143 Ibid 25–30.
144 139 S Ct 2482, 2508 (2019) ('*Rucho*').
145 Ibid 2500, 2506–7, cited in *Juliana* (n 105) 27.
146 *Juliana* (n 105) 28, quoting *MS v Brown*, 902 F 3d 1076, 1087 (9th Cir, 2018) (quoting *Obergefell v Hodges*, 135 S Ct 2584, 2605 (2015)).
147 *Juliana* (n 105) 28.
148 Ibid 32.
149 *Youth v Gov, 'Juliana v United States'* (Web Page, 2023) <https://www.youthvgov.org/our-case>.
150 Recent case, '*Juliana v United States'* (2021) 134(5) *Harvard Law Review* 1929.
151 Ibid 1929.
152 Ibid 1933.
153 Ibid 1935.

rights-recognition and flexible remedy-implementation, *Juliana* thus narrows the remedial powers of Article III courts.'[154]

Conclusion

For Australian lawyers, one thing that jumps out from the three cases is that the source of rights, in each case, was the national constitution — although in *Urgenda*, the *Dutch Constitution* did so procedurally by constituting the Netherlands' treaty obligation as not just part of domestic law but as part of the fundamental law of the country.

The cases nonetheless have lessons for Australian lawyers in that they do involve the adaption of particular formulations of rights to new situations. In *Urgenda*, the right to life and the right to respect for private and family life in the *ECHR* were given operation far beyond the world of police shootings and generally phrased search warrants so as to guarantee a healthy and viable environment.

Urgenda is also notable for the way in which it dealt with the obligation of individual countries, especially historically smaller economies, to contribute to mitigation of worldwide levels of emissions. There is an argument raised at the political level in Australia that Australia need not mitigate its emissions because, even if Australia reduced its emissions to zero, this would make no difference to the destructive path of history towards an overcooked world. The Netherlands courts took the unremarkable view that there was an obligation to do the right thing and carry one's proper share of the load. In *Leghari*, the court made the same point: even though Pakistan's contribution to world emissions was historically low and that adaptation was the primary task, it was still important for Pakistan to address its emissions and work to reduce them.

In *Leghari*, the court was prepared to take fundamental rights in the *Pakistan Constitution*, like the right to life and the right to human dignity, and to adapt them to guarantee a right to a clean and healthy environment. But the court was prepared to go further and apply these rights in the context of the constitutional principles of democracy, equality, and social, economic and political justice, and to derive from these latter the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter-generational equity and the public trust doctrine — all of which have been treated in many jurisdictions as 'soft' international environmental law.

Although presently unsuccessful, *Juliana* showed a similar ability to apply a 230-year-old Fifth Amendment and its due process clause to the existential issues raised by climate change. The US Supreme Court has turned its attention to due process rights. Albeit in the context of the Fourteenth Amendment, in *Dobbs v Jackson Women's Health Organization*,[155] the opinion of the Court[156] discussed substantive due process rights and stated that the due process clause has been held to guarantee some rights that are not mentioned in the *United States Constitution* but that any such right must be 'deeply rooted' in the nation's history and tradition, and implicit in the concept of 'ordered liberty'.[157] The Court held that a right to abortion does not satisfy that test. Whether a substantive constitutional right to a climate system capable of sustaining

154 Ibid.

155 No 19-1392, 597 US ___ (24 June 2022) ('*Dobbs*').

156 Delivered by Alito J and joined by Thomas, Gorsuch, Kavanaugh and Barrett JJ.

157 *Dobbs* (n 155) slip op, citing *Washington v Glucksberg*, 521 US 702, 721 (1997); see also 1 (Thomas J); 2 (Kavanaugh J).

human life — as the Ninth Circuit in *Juliana* was prepared to assume existed, without deciding the question — will be held to satisfy the test is a question for a subsequent day.

Juliana is also important for those elements which were found, at least for judgment on the pleadings purposes, to be satisfied. American authorities on standing have been influential in Australian courts going right back to *Australian Conservation Foundation Inc v Commonwealth*.[158] The finding that being affected by extreme weather events attributable to climate change is capable of amounting to concrete and particularised injury may have importance in future Australian cases.

Also important is the finding that causation is capable of being satisfied by a nation's contribution to greenhouse emissions over a substantial period of time. While this is still a tough standard to meet, especially if the contribution in question has to be as substantial as that of the United States, but, nonetheless, the distinction between a country's output and that of a single oil well or coalmine might also prove important in Australia.

That which emerges most clearly from a comparison of the three cases is the matter of judicial philosophy. The judges of the Netherlands, at different levels of the judicial hierarchy, saw no difficulty in making orders that the nation's government do something to combat the existential threat of climate change. The government has since acted in a bona fide way to comply with the order of the courts.

In *Leghari*, Shah CJ was prepared to be very proactive to get the government at national and provincial level to implement what was an already articulated and adopted, albeit ignored, plan. The number of hearing days and Shah CJ's judgments make it clear that the court was prepared to, and did, supervise the progress being made over a substantial period. One also gains the impression that politicians and officials were not only cooperative but generally welcomed the court's leadership on such an important issue to the country's future.

In *Juliana*, the Ninth Circuit Court of Appeals was quite frank. Despite accepting that the country was going to hell in a handbasket, the Court was unwilling to find that it had any power to assist. Although not definitive in the ruling, the Court's finicky approach to the effectiveness of a declaration was unconvincing. If the judicial remedy has to solve the whole problem by its orders before it can act, what is the use of it? Surely an order that improves things is better than no order at all.

The definitive basis of the ruling — that Article III courts have no power to make orders which require supervision in complex situations and that courts cannot make orders unless there are limited and precise standards discernible in the *Constitution* — raises questions about the role and use of courts in a world of existential crisis. At what point will courts be prepared to intervene? At some point, the danger from climate change will be so clear and present that failures by governments to act to save their citizens will approach the level of crimes against humanity. Nero was condemned by history for fiddling while Rome burned. At a more domestic level, a fire chief who failed to order their staff to the rescue when the danger from fire was evident would be found to have breached common law and statutory duties.

At some point, one would think, the law must grant a remedy to the victims of existential threats against failure to act by their governments. The problems with delayed remedies for existential threats, of course, is that no one will be around to file the writ.

158 (1980) 146 CLR 493.